



Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at <http://about.jstor.org/participate-jstor/individuals/early-journal-content>.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

THE AMERICAN LAW REGISTER

FOUNDED 1852.

UNIVERSITY OF PENNSYLVANIA

DEPARTMENT OF LAW

VOL. { 46 O. S. } { 37 N. S. }	NOVEMBER, 1898.	No. 11.
-----------------------------------	-----------------	---------

RIGHTS AND DUTIES OF BELLIGERENTS AND NEUTRALS FROM THE AMERICAN POINT OF VIEW.

The Declaration of Paris.

Notwithstanding the sound principles which the Law of Nations has consecrated as the rule and guide for the conduct of States in their several relations to each other, the arbitrary and selfish aggressions of crafty or ambitious rulers from time to time leads nations to ignore or violate the plainest provisions of this code. In particular, it seems difficult to maintain the political equilibrium across the Atlantic; and the clash of arms too frequently without just cause mars the harmony of the Concert of Europe. This disturbance and discord is usually ended by a return and recognition of first principles, which are re-asserted and embodied in rules or articles subscribed by the immediately interested powers. The normal relation of States and their citizens and subjects is occasionally restored by the voluntary retirement of the transgressor from an untenable and vicious position. A conspicuous illustration of the abandonment of false positions by two great

maritime powers occurred about the middle of the century. The situation at that period is thus stated :

“ On the breaking out of the war with Russia in 1854, as the combined effect of the English principle, that enemy's goods on neutral vessels are good prize, and the French doctrine, that neutral goods on enemy's vessels are so, would have been to almost put an end to neutral commerce, the English and French Governments declared that although they could not forego the right of seizing articles contraband of war, and of preventing neutrals from bearing the enemy's despatches, or from breaking effective blockade, they would “ waive the right of seizing enemy's property laden on board a neutral vessel, unless it be contraband of war.” Neither was it intended “ to claim the confiscation of neutral property, not being contraband of war, found on board enemy's ships.”¹

The Treaty of Paris, which terminated the Crimean War, was signed on March 30, 1856. The representatives of France, Austria, Prussia, Russia, Sardinia, Turkey, and Great Britain, which had been parties to the treaty, at the suggestion of the French plenipotentiary, assembled in conference for the purpose of discussing the rules of maritime capture, and, on April 16th, following, adopted a body of rules modifying the existing rules or usage in respect to capture, which have since been known as the Declaration of Paris. Since that date all the remaining civilized powers have given in their adherence to its principles, except the United States, Spain and Mexico. The history of this declaration is shrouded in mystery. Neither of the British diplomatists, directly concerned, have given a full account of the negotiations ; and the only detached statement was one published by the French Foreign Minister at the time. According to this statement, the declaration would have been made by the bulk of the civilized states whether Great Britain had acceded to it or not. In reference to the abolition of privateering, it has been said that, perhaps, the growing sense of humanity and the recollection of the squalid abuses connected with this mode of spoliation had

¹ Kent, I, p. 128, note 1, 13th Ed.

something to do with its disuse. "But much was due to this fact—the transformation of a merchant vessel into an efficient cruiser was not so easy as it was in the days of Paul Jones or Jean Bart."¹

This declaration consisted of the following four articles, viz.:

1. Privateering is and remains abolished.
2. The neutral flag covers enemy's goods, with the exception of contraband of war.
3. Neutral goods, with the exception of contraband of war, are not liable to capture under the enemy's flag.
4. Blockades, in order to be binding, must be effective; that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy.

The United States and Great Britain had long stood committed to the following points, in their opinion, established in the law of nations:

1. That a belligerent may take enemy's goods from neutral custody on the high seas; 2, that neutral goods are not subject to capture, from the mere fact that they are on board an enemy's vessel; 3, that the carrying enemy's goods by a neutral is no offence, and consequently not only does not involve the neutral vessel in penalty, but entitles it to its freight from the captors as a condition to a right to interfere with it on the high seas. . . . While the Government of the United States has endeavored to introduce the rule of "free ships, free goods," by convention, her courts have always decided that it is not the rule of war, and her diplomatists and her text writers—with singular concurrence, considering the opposite diplomatic policy of the country—have agreed to that position.²

The Declaration of Paris changed the position of Great Britain upon this question; and the United States, on the breaking out of the Civil War, communicated to the maritime powers of Europe their readiness to adopt the second, third, and fourth articles; and added that though they preferred

¹ J. Macdonell, "Recent Changes in the Rights and Duties of Belligerents and Neutrals according to International Law."

² Dana's Wheaton, note to § 475.

them with the amendment proposed by President Pierce's Secretary of State, Mr. Marcy, in 1856, exempting private property from capture at sea, and without the first article, they were willing to adopt them as they stood. This offer was declined by Great Britain and France, who desired to make special restrictions and exceptions applying to the Civil War and the Confederates.

Notwithstanding this, the United States made known their intention to follow the second, third, and fourth rules of the declaration during the Civil War. As the Executive policy was likely to be at variance with the judicial precedents, it was thought that the latter would come in conflict with the tenets of the second article. The Executive has control of such matters, however, by instructions to the navy as to the capture of neutral vessels, and also by ordering restitution if such capture should have occurred before adjudication is had. As a matter of fact, no case is reported to have happened of a condemnation in opposition of either the second or the third articles of the Declaration during the Civil War.¹

In the absence of an amendment of the Constitution of the United States by which the power "to grant letters of marque and reprisal" shall be stricken from the enumeration of its special grants—and such an amendment can scarcely be anticipated as a possibility—it is insisted that there can legally be no accession by the United States to the first article of the Declaration.² But this is a point of no present importance, as the proclamation of President McKinley in reference to the existence of war between the United States and Spain, dated April 26, 1898, announced that the policy of the government is not to resort to privateering, but to adhere to the rules of the Declaration of Paris. And it is hardly probable that the United States will ever resort to privateering. There is a distinction between a privateer and a letter of marque in this, that the former is always equipped for the sole purpose of war, while the latter may be a merchantman, uniting the

¹ Snow, *Int. Law*, p. 163.

² W. Winthrop, "The United States and the Declaration of Paris," *Yale Law Journal*, March, 1894, p. 118.

purpose of commerce to those of capture. In popular language, however, all private vessels commissioned for hostile purposes, upon the enemy's property, are called letters of marque.¹ The policy of the United States in regard to the second article of the declaration and to the doctrine of "free ships and free goods" has been expressed since the Civil War in several treaties, and the doctrine may be considered a settled one so far as the action of the United States may be concerned.²

The Right of Visitation and Search.

"In order to enforce the rights of belligerent nations against the delinquencies of neutrals, and to ascertain the real as well as assumed character of all vessels on the high seas, the law of nations arms them with the practical power of visitation and search. The duty of self-preservation gives to belligerent nations this right. It is founded on necessity, and is strictly and exclusively a war right, and does not rightfully exist in time of peace, unless conceded by treaty. All writers upon the law of nations, and the highest authorities, acknowledge the right in time of war as resting upon sound principles of public jurisprudence, and upon the institutes and practice of all great maritime powers. And, if, upon making the search, the vessel be found employed in contraband trade, or in carrying enemy's property, or troops, or despatches, she is liable to be taken and brought in for adjudication before a prize court."³

The British Government disclaim the right of *search* in time of peace, but they long time claimed the right of *visit*, in order to know whether a vessel, pretending, for instance, to be American, and hoisting the American flag, be really what she seems to be. But the Government of the United States would not admit the distinction between the right of visitation and search. They consider the difference to be one rather of

¹ Upton, *Maritime Warfare and Prize*, p. 186.

² *Treaties between the United States and other Powers, 1776-1887*, pp. 95, 200, 259, 249, 556, 585, 1196, 902, 938, 962, 1011, 1044.

³ Kent's *Comm. I*, p. 153, 13th Edition. The limitations of this right are suggested by Chief Justice Marshall in the opinion in the case of *The Nereide*, 9 Cranch. 389.

definition than principle, and that it is not known to the law of nations. They would not admit the exercise of the claim of visit to be a *right*, while the British Government conceded that, if, in the *exercise of the right of visit*, to ascertain the genuineness of the flag which a suspected ship bears, any injury ensues, prompt reparation will be made. The British Government have finally abandoned the claim of a right of visitation in time of peace for the purpose of verifying the flag, except so far as allowed by treaty. The intervisitation of ships at sea is a branch of the law of self-defence, and is, in point of fact, practiced by the public vessels of all nations, including those of the United States, when the piratical character of the vessel is suspected. The right of visit is conceded for the sole purpose of ascertaining the real national character of the vessel sailing under suspicious circumstances, and is wholly distinct from the right of search. It has been termed, by the Supreme Court of the United States, the *right of approach* for that purpose;¹ and it is considered to be well warranted by the principles of public law and the usages of nations.² This, however, has never been supposed to draw after it any right of visitation and search. The right of approach is for the sole purpose of ascertaining the real nationality of the vessel sailing under suspicious circumstances.

The seizure by Spain of the steamer *Virginus*, carrying the American flag, upon the high seas in 1873, during time of peace, has been justified by some authorities in the United States who rest the ground of seizure on the great right of self-defence, which, springing from the law of nature, is as thoroughly incorporated into the laws of nations as any right can be. The Attorney-General of the United States, however, took the following ground:

“Spain, no doubt, has a right to capture a vessel with an American register and carrying the American flag, found in her own waters, assisting or endeavoring to assist the insurrection in Cuba; but she has no right to capture such a vessel on the high seas upon an apprehension that, in violation of

¹ *The Mariana Flora*, 11 Wheaton, 1, 43.

² Bynk, Q. J., Pub. lib., c. 114, s. p.; Kent's Comm. I, p. 153, note.

the neutrality or navigation laws of the United States, she was on her way to assist said rebellion." Even assuming that the vessel was lawfully seized, there was no justification for the summary execution of foreigners by order of a court-martial; and both the United States and Great Britain demanded reparation in behalf of those persons of their respective nationalities who had been executed by the captors of the *Virginus*. This reparation Spain had eventually to make.¹

Mr. Webster, in his correspondence with Lord Ashburton, stated the rule to be, "That while it is admitted, that exceptions growing out of the great law of self-defence do exist, those exceptions should be confined to cases in which the necessity of that defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation." And, in the case of the *Virginus*, this law of self-defence was insisted upon in vindication of the actual seizure by a Spanish gunboat on the high seas. But owing to the untoward fate of the *Virginus*, the question of the legality of the seizure of a *bona fide* American vessel, under similar circumstances to those attending the seizure of the *Virginus*, was thus not definitely settled.

Halleck states the rule to be that there is no right, in time of peace, except in cases of piracy everywhere, or of vessels committing crimes against municipal law in the territorial waters of the power making the visit, or of vessels suspected of having hostile intent against a power in time of peace. And, it being a doubtful exercise of a very delicate power, all that can be said is, that a nation would make such search and seizure at her peril.

"The right of visitation is, by the law of nature, an intercourse of mutual benefit, like that of strangers meeting in a wilderness. The right of search is for pirates in peace and for enemies in war."²

"The United States Government," wrote Mr. Evarts, Secretary of State in 1880, "never has recognized and never will recognize any pretense or exercise of sovereignty on the part

¹ Wharton's Dig. Intl. Law, III, 327; Snow, Int. Law, p. 44.

² J. Q. Adams, Memoir; see Wharton, Int. Law Dig. III, p. 122.

of Spain, beyond the belt of a league from the Cuban coast, over the commerce of this country in time of peace. This rule of the law of nations we consider too firmly established to be drawn into debate, and any dominion over the sea outside this limit will be resisted with the same firmness as if such dominion were asserted in mid-ocean. The revenue regulations of a country, framed and adopted under the motive and to the end of protecting trade with its ports against smuggling and other frauds which operate upon vessels bound to such ports, have, without due consideration, been allowed to play a part in the discussions between Spain and the United States on the extent of maritime dominion accorded by the law of nations which does not belong so them."¹

The exercise of the right of visitation and search must be conducted with due care and regard to the rights and safety of the vessels.² If the neutral has acted with candor and good faith, and the inquiry has been wrongfully pursued, the belligerent cruiser is responsible to the neutral in costs and damages to be assessed by the prize court which sustains the judicial examination. The mere exercise of the right of search involves the cruiser in no trespass, for it is strictly lawful; but if he proceeds to capture the vessel as prize, and sends her in for adjudication, and there be no probable cause, he is responsible. It is not the search, but the subsequent capture, which is treated in such a case as a tortious act. If the capture be justifiable, the subsequent detention for adjudication is never punished with damages; and in all cases of marine torts, courts of admiralty exercise a large discretion in giving or withholding damages.³ The right of visitation and search is sometimes laid under special restrictions, by convention between maritime states.⁴

The Government of the United States admits the right of

¹ Wharton, *Int. Law Dig.* III, p. 163, *et seq.*

² *The Anna Maria*, 2 Wheaton, 329.

³ *The Thompson*, 3 Wall. 155; *La Manche*, 2 Sprague, 207; *The Jane Campbell*, Blatchford Prize Cases, 101; *The Dashing Wave*, 5 Wall. 170.

⁴ See, for instance, Art. 17 of the Convention of Navigation and Commerce between the United States and the Peru-Bolivian Confederation, May, 1838.

visitation and search by belligerent government vessels of their private merchant vessels, for enemy's property, articles contraband of war, or men in the land or naval service of the enemy. But it does not understand the law of nations to authorize, and does not admit, the right of search for subjects or seamen. The claim of Great Britain to the right of search, on the high seas, of neutral vessels, for deserters and other persons liable to military and naval service, has been a question of animated discussion between that government and the United States. It was one of the principal causes of the War of 1812, and remains unsettled to this day. In the discussions in 1842, between Lord Ashburton and Mr. Webster, relative to the boundary line of the State of Maine, the American Minister incidentally discussed the subject, and intimated that the rule hereafter to be insisted on would be, that every regularly documented American merchant vessel was evidence that the seamen on board were American, and would find protection under the American flag. The right of search is confined to private merchant vessels, and does not apply to public ships of war or vessels in the public service. The captain of a merchant steamer is not privileged from search by the fact that he has a government mail on board.¹

The right of search, as a belligerent right, is limited as follows :

(a.) A neutral ship is not to be ordinarily searched when on a voyage between two neutral ports.

(b.) As a belligerent right it can only be exercised when war is raging.

(c.) It was to be under direction of the commanding officer of the belligerent ship, and through the agency of an officer in uniform.

(d.) It must be based on probable cause ; though the fact that this cause turned out afterwards to be a mistake, does not of itself make the arrest wrongful.²

(e.) Contraband goods cannot ordinarily be seized and appropriated by the captor. His duty is to take the vessel

¹ The *Peterhoff*, 5 Wall. 28.

² The *Thompson*, 3 Wall. 155 ; The *Dashing Wave*, 5 Wall. 170.

into a prize court, by whom the question is to be determined.

(f.) Where the right exists, a belligerent cruiser is justified in enforcing it by all means in his power.¹

(g.) In case of violent resistance to a legitimate visitation, the vessel so resisting may be open to condemnation by a prize court as prize. But this is not the case with mere attempt at flight. And there should be no condemnation of a neutral vessel whose officers, having no reasonable ground to believe in the existence of war, resisted search.²

(h.) The right of search, so it is held by the powers of Continental Europe, is not to be extended to neutral ships sailing under the convoy of a war ship of the same nation. This view, however, has not been accepted by Great Britain. But in any view, the commanding officer of the convoy must give assurance that the suspected vessel is of his nationality, under his charge, and has no contraband articles on board. Twiss³ maintains it to be a clear maxim of law that "a neutral vessel is bound, in relation to her commerce, to submit to the belligerent right of search." It is not competent, therefore, he insists, for a neutral merchant to exempt his vessel from the belligerent right of search, by placing it under the convoy of a neutral or enemy's man-of-war.⁴

The doctrine of the courts of the United States in this relation has been stated above.

Mere evasive conduct, or subterfuges, which might be the result of ignorance or terror, are not conclusive proof of culpability.⁵

¹Lawrence on Visitation and Search.

²Field's Int. Code, 871.

³Law of Nations, Part II, 96.

⁴Kent's Comm. I, p. 154.

⁵The Pizarro, 2 Wheat. 227; Wharton, Int. Law. Dig. III, § 325; Woolsey, Int. Law, 190. "The Right of Search is inseparably bound up with the right of seizing goods which fall under the description of Contraband; and the latter right (although its limits are, as will be seen, somewhat indefinite) is one of the most firmly established in the Law of Nations. And rightly so. For War, although a legal, is none the less an abnormal relation of States. The end of War is Peace; and it is accordingly proper that no State which does not take the responsibility of itself joining in the war should interfere to render any aid to either of

Blockade.

Blockade has been defined to be, the carrying into effect by an armed force, of that rule of war which renders commercial intercourse, with the particular port or place subjected to such force, unlawful on the part of neutrals. Blockades may be either military or commercial, or may partake of the nature of both. As military blockades, they may partake of the nature of a land or land and sea investment of a besieged city or seaport, or they may consist of a masking of an enemy's fleet by another belligerent fleet in a port or anchorage where commerce does not exist. At one time the United States advocated the abolition of commercial blockades, but afterwards, during the Civil War, established the largest commercial blockade ever known. Among the rights of belligerents there is none more clear and incontrovertible, or more just and necessary in the application, than that which gives rise to the law of blockade. The law of blockade is, however, so harsh and severe in its operation, that, in order to apply it, the fact of the actual blockade must be established by clear and unequivocal evidence; and the neutral must have had previous notice of its existence; and the squadron allotted for the purposes of its execution must be competent to cut off all communication with the interdicted place or port; and the neutral must have been guilty of some act of violation, either by going in, or attempting to enter, or by coming out with a cargo laden after the commencement of the blockade. The failure of either of the points requisite to establish the existence of a legal blockade amounts to an entire defeasance of the measure, even though the notification of the blockade had issued from the authority of the government itself. The Government of the United States has uniformly insisted that the blockade should be effective by the presence of a competent force, stationed and present at or near the

the parties, which would result in prolonging the conflict. Aid *publicly* rendered by a State would of course properly be treated as itself an act of war. . . . It is curious that the term Contraband, now so familiar, does not appear in this connection until a late date." Contraband of War; Juridical Review, July, 1898.

entrance to the port; and they have protested with great energy against the application of the right of seizure and confiscation to ineffectual or fictitious blockades.¹

The neutral has the general right of trade and access to a belligerent unless this right comes in contact with the special needs and operations of the other belligerent; but these needs and operations, as in other matters of the kind, must be duly set forth and carried on under certain rules and usages in conformity with the law of nations. Among the first of these rules is the one that the blockade must be properly instituted, and sufficiently made known to all likely to be affected by its institution. There is a difference in the usage of nations as to the amount of notification necessary to be given to neutrals. The practice of the United States and Great Britain, which is followed by Germany and Denmark, is to recognize two kinds of blockade, one *de facto*, which begins and ends with the fact and which condemns no vessel attempting to enter the harbor unless previously warned off, and the other a blockade of which notice is duly promulgated and accompanied by the fact.

In the latter case it is to be presumed that the blockade continues until notice to the contrary is given by the blockading state. In this case ignorance of the blockade is not accepted as an excuse for sailing for the blockaded port or an appearance in its vicinity. Being bound to a blockaded port is considered evidence, under ordinary circumstances, of an intention to violate the blockade. A neutral cannot be permitted to place himself in the vicinity of a blockaded port, if his situation be so near that he may, with impunity, break the blockade whenever he pleases, and slip in without obstruction. It is a presumption, almost *de jure*, that the neutral, if found on the interdicted waters, goes there with an intention to break the blockade; and it would require very clear and satisfactory evidence to repel the presumption of a criminal intent.² The

¹ The *Peterhoff*, 5 Wall. 28; The *Sarah Starr*, Blatchf. Pr. 69; The *Douro*, ib. 62; The *Baigorry*, 2 Wall. 474; The *Circassian*, ib. 135; Kent, Comm. I, 145.

² The *Cornelius*, 3 Wall. 214; The *Sea Witch*, 6 Wall. 242; Kent, I., 145, 149, note; Snow, Int. Law, 149; The *Diana*, 7 Wall. 354.

United States, although not a party to the Declaration of Paris, have at a later date agreed to a clear and satisfactory definition of an effective blockade.

"It is expressly declared that such places only shall be considered blockaded as shall be actually invested by naval forces capable of preventing the entrance of the neutrals, and so stationed as to create an evident danger on their part to attempt it."¹

The Instructions by the United States Navy Department to Blockading Vessels and Cruisers, issued June 20, 1898, are specific as to this and as to Notifications to Neutrals. The permissible exception to the general rule which requires the presence of an adequate force to make a blockade effective is the temporary absence of the blockading vessels through stress of weather.

The Doctrine of Continued or Continuous Voyages.

This doctrine, which originated with Sir Wm. Scott, was applied adversely to certain American interests in the last century, and although repudiated by continental jurists and by some American writers, it was, during the Civil War, adopted and somewhat extended by American prize courts at a time when it bore severely on certain interests and adventures of English shippers and shipowners. Applied to the carriage of contraband and to the breach of blockade, it became the settled practice of the American prize courts during the late Civil War.² This doctrine, however, has not been accepted by continental publicists, and in the case of the *Springbok*, particularly, there has been sharp dissent by authoritative English and American writers. It has been pointed out that there is some variation between the earlier and later opinions of Sir Wm. Scott.³ In the *Hart* case, it was

¹ U. S. Treaties, Italy, 1871, p. 507.

² *The Hart*, 3 Wall. 559; *The Peterhoff*, 5 Wall. 28; *The Springbok*, 5 Wall. 1-28.

³ Wharton, Int. Law, III, §§ 329*, 362, 375; Snow, Int. Law, 157. "The theory of continuity of voyage is not a new invention, but only recently has it been applied to the violation of blockades. It is a revival of the

held, if the guilty intention of transporting contraband goods existed when the goods left their own port, such intent could not be obliterated by the innocent intention of shipping at a neutral port in the way, and that such voyages form one transaction. A review of the *Springbok* case, and incidentally of the question of continuous voyages, was made in 1878 by Hon. J. C. Bancroft Davis, formerly Assistant Secretary of State and later Minister to Berlin, as a reply to a paper by Sir Travers Twiss.¹ This review replies to the criticisms and objections raised by that learned writer. Mr. Davis takes the ground that the doctrine of continuous voyages, although opposed by the continental publicists, is one held by the English and American courts; that is to say, by the courts of the principal maritime powers of the world, and hence, that this doctrine cannot justly be regarded as one imposing special and onerous restrictions upon neutral commerce. The fact that the United States have been a defender of neutral rights in the past does not, says Mr. Davis, require them to advocate and justify a fictitious neutrality. In this case the Supreme Court held that, "where goods destined for a belligerent port are being conveyed between two neutral ports by a neutral ship, it, though liable to seizure in order to the confiscation of the goods, is not liable to condemnation as prize;" and that "where the cargo was originally shipped with intent to violate the blockade, to be transshipped at a neutral port, the liability to condemnation, if captured during any part

famous rule of the war of 1756, by which it was held to be incompatible with neutrality for the subject of a neutral state to engage in time of war in a commerce between a belligerent and his colonies when such commerce was interdicted by the latter belligerent in time of peace. With the view of escaping the harshness of this rule neutrals took an intermediate neutral port as the medium by which they carried on trade between the colony and the mother country. In order to stop this trade, Sir Wm. Scott invented what he called the doctrine of continuous voyages, by which the voyage from the intermediate port to the mother country was held to be continuous with that between the colony and the intermediate port, though no seizures were permitted except on voyages between the intermediate port and the belligerent port." Fauchille; *Du Blocus Maritime*, Paris, 1882, 335 ff.

¹ *Les Tribunaux de Prises des États Unis*, Paris, 1878.

of that voyage, attached to the cargo from the time of sailing."

The law officers of the Crown advised the British foreign office that "there was nothing to justify the seizure of the bark *Springbok* and her cargo, and that her Majesty's Government would be justified in demanding the immediate restitution of the ship and cargo, without submitting to any adjudication by an American prize court. But while this was the law so given, the British commissioner, when the case came before the Mixed Claims Commission, under the Treaty of Washington, in May, 1877, united with the other commissioners in finding against the claimant for the cargo.

Down to this hearing it was understood that the British Government, acting under the advice of its law officers, had disapproved of the condemnation. Mr. Evarts' argument before the Mixed Commission, however, went to show that the condemnation, while, perhaps, sustainable under the British system as defined by Lord Stowell,¹ was, in antagonism, not merely to the doctrines set forth in Lord Stowell's time by the United States, but to those modern restrictions of blockade, by which alone the rights of neutral commerce can be sustained against a belligerent having the mastery of the seas. It is not strange that the British Commissioner should have declined to set aside a ruling so consistent with the older British precedents and so favorable to belligerent maritime ascendancy.² Dr. Francis Wharton, former Solicitor of the Department of State, states forcibly the grounds of his dissent from the ruling of a majority of the Supreme Court³ and the Mixed Claims Commission, and concludes by saying: "The decision cannot be accepted without discarding those rules as to neutral rights for which the United States made war in 1812, and which, except in the *Springbok* and cognate cases, the Executive Department of the United States Government, when

¹The title which Sir Wm. Scott bore after the recognition of his eminent services in Her Majesty's High Court of Admiralty.

²Wharton's Int. Law Dig. III, 362.

³Of the nine justices composing the Supreme Court at the time of the decision in this case, four justices dissented.

stating the law, has since then consistently vindicated. The first of these is that blockades must be of specific ports. The second is that there can be no confiscation of non-contraband goods owned by neutrals and in neutral ships, on the ground that it is probable that such goods may be, at one or more immediate ports, transshipped or re-transshipped, and then find their way to a port blockaded by the party seizing. The ruling is in conflict with the views generally expressed by the Executive Department of the Government of the United States, a department which has not merely co-ordinate authority in this respect with the judiciary, but is especially charged with the determination of the law of blockade, so far as concerns our relations to foreign states."¹

The maritime prize commission, nominated by the Institute of International Law at the session at Wiesbaden, condemned the doctrine laid down and applied by the Supreme Court of the United States in the case of the cargo of the *Springbok*, as a serious inroad upon the rights of neutral nations, and as inconsistent with the spirit of important amendments of the rules of maritime warfare of which the United States has been the zealous promoter.²

The United States has long been a leader in the assertion and vindication of the Rights of Neutrals; and the surrender or waiver of any the least of these rights would properly be regarded with regret, while it would be justly condemned as a sacrifice of principles which her eminent statesmen and representatives have from the earliest days eloquently insisted had become incorporated in the Law of Nations.³

¹ Wharton's Int. Law Dig. III, § 362.

² *Revue de droit international*, t. XIV, p. 328 (1882).

³ Two opinions memorable in the history of International Jurisprudence, which were rendered by Mr. William Pinkney, American Commissioner, under Article VII of the Jay Treaty, A. D. 1794, in the cases of the *Betsey* and the *Neptune*, present an exhaustive and fascinating consideration of the principles upon which are founded the Rights and Duties of Neutrals. The contemporary of many illustrious men, Mr. Pinkney is a conspicuous figure in American history. Distinguished as orator, jurist and diplomatist, his honorable and useful career emphasizes the familiar lesson that not talents alone, but character and patient industry are necessary to achieve great results, and to insure permanent

The Case of The Circassian. A British ship, the *Circassian* and cargo, was seized on the 4th day of May, 1862, between Matanzas and Havana, as a prize of war, upon the allegation that the master of the vessel was engaged in the voyage or adventure to break the blockade of the port of New Orleans. This seizure occurred after this city had been captured and occupied by the Federal forces. The Supreme Court of the United States held :

That the capture by the United States forces of the forts commanding the approaches to the city, did not terminate the blockade of New Orleans but on the contrary made it more complete and absolute ; that such blockade was not terminated by the military occupation of the city, the occupation being limited and recent ; that a simple blockade may be established by a naval officer, acting upon his own discretion or under direction of superiors, without governmental notification ; that a public blockade is established and notified to other governments by the government directing it ; that in case of a simple blockade, the captors are bound to prove its existence at the time of the capture ; while in the case of public blockade, the claimants are held to proof of discontinuance, in order to protect themselves from the penalties of attempted violation ; that the blockade of the rebel ports must be presumed to have continued until notification of discontinuance ; that it is the duty of the belligerent government to give prompt notice, but it must judge for itself when it can dispense with the blockade ; that the proclamation of the President on the 12th of May, 1862, dispensing with the blockade of New Orleans, is conclusive evidence that the blockade was not terminated by military occupation on the 4th of May ; that sailing from a neutral port with intent to enter a blockaded port, and with knowledge of the existence of the blockade, subjects the vessel, and in most cases, its cargo, to capture and condemnation ; that destruction on the eve of capture, of

fame. Mr. Adams has said that it was his good fortune to have known three individuals who were perfect in their respective characters : Mrs. Siddons as Actress ; Mr. Pitt as Parliamentary Debater ; and Mr. Pinkney as Lawyer.

a package of letters, relating, no doubt, to the ship and voyage, is a strong circumstance against the ship and cargo; that a ship was bound primarily to Havana, does not relieve her from the liability to capture, where the vessel was chartered and her cargo shipped with the purpose of forcing the blockade, and the destination to Havana only colorable.¹

This ruling, it is said, conflicts with *Thirty Hogsheads v. Boyle*,² and Mr. Justice Nelson dissented on the ground that the condemnation was not warranted; and he expressed his dissent "not on account of the amount of property involved, though that is considerable, or from any particular interest connected with the case, but from a conviction that there is a tendency, on the part of the belligerent, to press the right of blockade beyond its proper limits, and thereby unwittingly aid in the establishment of rules that are often found inconvenient, and felt as a hardship, when, in the course of events, the belligerent has become a neutral."

The dissenting Justice is quoted by Mr. W. B. Lawrence as saying, soon after the decision of this case by the Supreme Court, what follows:

"The truth is," he said, "the feeling of the country was deep and strong against England, and the judges as individual citizens, were no exception to this feeling. As to the feeling of hostility to England at the time, Judge Black told me that, after my dissenting opinion in this case was read, one of the most eminent members of the bar had said to him that 'the delivery of it was the greatest mistake of my life.'" "Now," added Judge Nelson, "that the passions and prejudices of the hour had passed away, there are not, and cannot be, two different opinions in that case." In the same article it is said, "Neither the Executive nor Congress, at the commencement of the difficulties with the South, seem to have distinguished between municipal and belligerent rights, nor as to the different jurisdictions by which they were to be enforced."

¹ *Hunter, Etc., v. U. S.*, 2 Wall. 135.

² 9 Cranch. 191.

³ *International Obligations*, North American Review, July-Aug., 1878.

In this case the Mixed Claims Commission¹ practically overruled the decision of the Supreme Court of the United States, and awarded to the several claimants, according to their respective interests, two hundred and twenty-five thousand one hundred and seventy-four dollars (\$225,174). The American Commissioner read a dissenting opinion.

Contraband of War.

In time of war the belligerent contends for the rigor of war, and the neutral insists upon the freedom of commerce, and each successive conflict tends to energize the contention of these conflicting interests. The Law of Nations, designed for the welfare of all nations, whether in time of peace or during war, has always aimed to establish principles and rules of conduct applicable under these varying conditions that would be uniform, equitable and just to all parties ; but the struggle for supremacy on the part of these conflicting interests has largely influenced practice.

The general law of contraband may be given under two heads, as follows :

1. A state may not lawfully furnish contraband articles to either belligerent, whether shipment be by land or by water.
2. The citizens of a neutral state may sell contraband articles to a belligerent (ships of war or torpedo boats excepted) subject only to the risk of capture by the cruisers of the opposing belligerent. That is to say, such trade is legal from the neutral point of view and illegal from the belligerent point of view. The neutral state is not bound to prevent the trade ; but a belligerent may prevent it by seizing the goods in transit on the ocean, by the law of right of self-defence and self-preservation.

In the case of the *Peterhoff*² the Supreme Court made the following general classes : The first consists of articles manufactured and primarily and ordinarily used for military purposes in time of war ; the second, of articles which may be and are used for purposes of war and peace, according to circumstances ;

¹ Treaty of Washington, May 8, 1871, Article xiii.

² 5 Wall. 28.

and the third, of articles exclusively used for peaceful purposes. Merchandise of the first class, destined for a belligerent country or places occupied by the army or navy, is always contraband; merchandise of the second class is contraband only when actually destined to the military or naval use of a belligerent; while merchandise of the third class is not contraband at all, although liable to seizure and condemnation for violation of blockade or siege.

In the case of the *Commercen*¹ the court held that, by the modern law of nations, provisions are not, in general, deemed contraband, but they may become so, although the property of a neutral, on account of the particular situation of the war or on account of the destination. If destined for the ordinary use of life in the enemy's country they are not, in general, contraband, but it is otherwise if destined for military use. Hence, if destined for the army or navy of the enemy, or for his ports of naval or military equipment, they are deemed contraband.

Articles contraband of war are divided into two classes: First, such as are absolutely contraband; and second, such as are conditionally contraband.

President McKinley, by proclamation of April 26, 1898, declared that "the neutral flag covers enemy's goods, with the exception of contraband of war."² Articles conditionally contraband are: Coal, when destined for a naval station, a port of call, or a ship or ships of the enemy; materials for the construction of railways or telegraphs, and money, when such materials or money are destined for the enemy's forces; provisions, when destined for an enemy's ship or ships, or for a place that is besieged." Horses are included in the class absolutely contraband.

Contraband may be furnished by citizens to belligerents without a breach of neutrality, either under international law or the municipal law of the United States. These laws are

¹ 1 Wheaton, 382.

² A list of contraband of war issued by authority of the executive department, appears in the "Instructions to Blockading Vessels and Cruisers."

satisfied by the external penalty of confiscation of such of these articles as shall fall into the hands of the belligerent powers on their way to the ports of their enemies.¹

Destination to a neutral port will not protect from capture articles contraband where an ultimate destination to the enemy's country or blockaded port can be shown, the immediate neutral destination being used only to cover the transaction.² In all such cases the transportation or voyage of the contraband goods is to be considered as a unit, from the port of lading to the port of delivery in the enemy's country; and if any part of such voyage or transportation be unlawful (from the standpoint of the belligerent), it is unlawful throughout; and the vessel and her cargo are subject to capture as well before arriving at the first neutral port at which she touches after her departure from the original port as on the voyage or transportation by sea from such neutral port to the port of the enemy. When goods are once clearly shown to be contraband, confiscation is the natural consequence. This is the practice in all cases, as to the article itself, excepting provisions; and as to them, when they become contraband, the ancient and strict right of forfeiture is softened down to a right of preemption on reasonable terms.³ The question whether particular articles are contraband or not contraband of war is one of evidence, to be determined in each case by reference not to one particular rule of law, but many; not to any one fact, however strong that may be, but to all the circumstances connected with the goods in question. It is not only, or not so much, whether the goods are in themselves, or as belonging to a class, capable of being applied to a military or naval use, but whether, from all the circumstances connected with them, those very goods are or are not destined for such use.

As to the neutral carrier, it is said:

“By the present practice of nations, if the neutral has done

¹ Wharton, *Int. Law Dig.* III, 391, where the authorities and rulings are collected.

² The Hart, 3 Wall. 559.

³ Kent Comm. I., p 141.

no more than carry goods for another which are in law contraband, the only penalty upon him is the loss of his freight, time and expenses. If he makes use of fraudulent devices to mislead the belligerent and defeat or impair the right of search, he is liable to condemnation for unneutral acts in aid of the enemy. So, if he not only carries contraband goods, but engages in a contraband service But if the vessel has no relations with the enemy's government, and, as a private merchant vessel, is carrying goods on private account, as merchandise, to the enemy's ports, to be put into the market there or delivered into private hands, she is not, as the practice is now settled, liable to condemnation, whatever be the character of the cargo The interests of peace and commerce on the one hand, and those of war on the other, have, in the conflict of their forces, rested at a practical line of settlement. The interests of peace have prevailed so far as to permit the carrier to transport contraband goods, subject to no other penalty than the loss of his commercial enterprise, *i. e.*, his freight and expenses, while the interests of war have prevailed so far as to permit the belligerent to stop the contraband goods on their passage and convert them into his own use. The advantage of this is that the carrying trade of the world may go on, subject to an ascertainable risk, which may be provided for by contract and guarded against by insurance; and producers and merchants can continue their business and procure transportation without criminality, taking the risk of the capture and condemnation of noxious articles. At the same time the belligerents have the further security of being able to condemn all the interests involved, whether vessel or cargo, if there have been fraudulent practice or hostile service.¹

Infectious nature of Contraband. Contraband articles are said to be of an infectious nature, and they contaminate the whole cargo belonging to the same owners. The innocence of any particular article is not usually admitted to exempt it from the general confiscation. By the ancient law the ship was liable to condemnation; but by the modern law the act

¹ Dana's Wheaton, p. 661, note; Kent, Comm. I, p. 142.

of carrying contraband is attended only with the loss of freight and expenses, unless the ship belongs to the owner of the contraband articles, or the carrying of them has been connected with malignant and aggravating circumstances; and among those circumstances, a false destination and false papers are considered as the most heinous. In those cases, and in all cases of fraud in the owner of the ship, or his agent, the penalty is carried beyond the refusal of freight and expenses, and is extended to the confiscation of the ship, and the innocent parts of the cargo.¹

Penalties Affecting Contraband. In strictness, every article which is either necessarily contraband, or which has become so from the special circumstances of the war, is liable to confiscation; but it is usual for those nations who vary their list of contraband to subject the latter class to preemption only, which, by the English practice, means purchase of the merchandise at its market value, together with a reasonable profit, usually calculated at ten per cent. on the amount. This mitigation of extreme privileges is also introduced in the case of products native to the exporting country, even when they are affected by an inseparable taint of contraband.²

The Trent Affair. In November, 1861, Captain Wilkes, of the U. S. war steamer *San Jacinto*, after firing a round shot and a shell, boarded the English mail packet *Trent*, in Old Bahama Channel, on its passage from Havana to Southampton, and by force carried off Messrs. Mason and Slidell, envoys or ministers from the Confederate States, accredited respectively to Great Britain and France, who had been taken on board as passengers bound for England. They were conveyed to the United States, and committed to prison; but after a formal requisition by Great Britain, declaring the capture to be illegal, they were surrendered by the Federal Government. The American Secretary of State took the ground that these envoys and their despatches were contraband of war, and that the *Trent* might properly have been carried into port and

¹ The *Peterhoff*, 5 Wall. 28; *Springbok*, 5 Wall. 1; *The Bermuda*, 3 Wall. 514; *The Hart*, 3 Wall. 559; *Kent Comm. I*, p. 142.

² *Hall, Int. Law*, p. 585.

condemned as prize. If such a condemnation had taken place, it was intimated that, as there was no direct process in prize courts against contraband persons, the adjudications against the ship would have carried the right to detain the persons for carrying whom she was condemned, as an indirect consequence. But as the ship was released by Captain Wilkes without necessity, and partly out of consideration for her innocent passengers, the capture was waived while incomplete, and the prisoners must therefore be released also. The principle was thought to be similar to the denial of the right of belligerents to search neutral vessels which the American Government had always made. The British Government did not acquiesce in these propositions, but denied that the conveyance of public agents of this character to Great Britain and France, and of their credentials or despatches (if any) on board the *Trent*, was or could be a violation of the duties of neutrality on the part of the vessel; and both for that reason, and also because the destination of these persons and despatches was *bona fide* neutral, it was thought certain that they were not contraband. The government further declared that it would not acquiesce in the capture of any British merchant ship in circumstances similar to those of the *Trent*, even though it was brought before a prize court. Mr. Dana thinks that this case can be considered as having settled but one principle, and that no longer disputed: that a public ship, though of a nation at war, cannot take persons out of a neutral vessel at sea whatever may be the claim of her government on those persons.¹

Maritime Prizes.

Prize is a technical term to express a legal capture. In order to constitute a capture, some act should be done indicative of an intention to seize and to retain as prize; and it is sufficient if such intention is fairly to be inferred from the conduct of the captor.² Questions of prize are exclusively of admiralty jurisdiction.³ In the United States the district courts act as

¹ Kent, Comm. 13th ed., I, p. 153, note; Wheat., Dana's note, 228.

² *Miller v. The Resolution*, 2 Dall. 1; *The Grotius*, 9 Cranch, 368.

³ *Bingham v. Cabot*, 3 Dall. 19.

courts of common law and also as courts of admiralty. The prize jurisdiction of a court of admiralty is that which authorizes it to take cognizance of captures made on the high seas *jure belli*; of captures in foreign ports and harbors; of captures made by naval forces on land; of surrenders to naval forces, either solely or by joint operation with land forces, and this without regard to the character of the property captured, whether ships, goods, or mere *choses in action*; of captures made in rivers, ports and harbors of the enemy's country; and of moneys or property paid or received as ransom or commutation on a capitulation to naval forces, whether alone or jointly with land forces, for the purpose of determining whether the property captured or surrendered is or is not lawful prize of war, to the end that if determined to be not lawful prize, restitution may be decreed, unconditionally or upon terms; and if it be determined that it is lawful prize, condemnation and sale may be decreed, followed by a decree of distribution of its proceeds, pursuant to the law which regulates such distribution. The right to all captures vests primarily in the sovereign, and no individual can have any interest in a prize, whether made by a public or private armed vessel, but what he receives under the grant of the state.¹ "I know of no other definition of prize goods," said Sir William Scott (Lord Stowell), in the case of the *Two Friends*,² "than that they are goods taken on the high seas *jure belli*, out of the hands of the enemy."

The district courts possess all the powers of a prize court and have cognizance of complaints, by whomsoever instituted, in cases of captures made within the United States. In prize cases appeals from the final decrees of the district court may be carried direct to the Supreme Court of the United States. The rules of international law recognized are those admitted by common custom at the period when the United States became independent, except when modified by treaty. And

¹ Kent Comm. I, pp. 100, 354, 355; Upton, *Maritime Warfare and Prize*, p. 388; *The Siren*, 7 Wall. 152; *Stewart v. U. S.*, 1 Court of Claims (Nott & H.), 113.

² 1 C. Rob. 271.

the practice of our prize courts, which are the real expounders of the law, conforms to that of the British courts, except when modified by treaty. But the rules adopted by Great Britain since the United States ceased to be a part of the British Empire are entitled to no more authority in our courts than those of other countries. The exclusive jurisdiction in prize of the admiralty was asserted as to captures made on the Mississippi river during the Civil War. But Congress enacted¹ that no property seized or taken upon any of the inland waters of the United States by the naval forces thereof should be regarded as maritime prize, but that it should be delivered to the proper officers of the courts, or as provided in that act and the act approved March 12, 1863,² as to abandoned and captured property.³ Private property captured on land by the naval forces was held not to be maritime prize, subject to the prize jurisdiction of the United States courts, though a proper subject of capture.⁴ It has been said that captures by the army and navy jointly are not distributable in the admiralty apart from statute; and in this country they accrue exclusively to the benefit of the United States.⁵ The Act of July 17, 1862,⁶ authorized a proceeding *in rem* in the district courts, conformable to those in admiralty or revenue cases, against the property of Confederates during the Civil War.⁷

When certain Spanish vessels were captured in the harbor of Santiago de Cuba, recently, by the land forces of the United States, a claim was made by the blockading fleet for their con-

¹ Act of July 2, 1864, c. 225, No. 7, 13 U. S. St. at L. 377.

² 12 U. S. St. at L. 820.

³ See the Cotton Plant, 10 Wall. 577.

⁴ Mrs. Alexander's Cotton, 2 Wall. 404; U. S. v. Weed, 5 Wall. 62; U. S. v. 26912 Bales of Cotton, 1 Woolw. 236; 25 Law. Rep. 451; U. S. v. Winchester, 99 U. S. 372. But the first case was put partly on the Act of July 17, 1862; and see 680 Pieces of Merchandise, 2 Sprague, 233; 103 Casks of Rice, Blatch. Pr. 211; 282 Bags of Cotton, ib. 302, which were decided the other way, on their peculiar circumstances.

⁵ The Siren, 1 Lowell, 280; The Siren 13 Wall. 389; Porter v. U. S., 106 U. S. 607.

⁶ C. 195, No. 7, 12 St. at L. 591.

⁷ Kent Comm. I, p. 357, text and notes; Upton's Maritime Warfare and Prize, pp. 383, *et seq.*

demnation as prize ; but this claim was denied and the vessels were held to be the property of the government. This incident provoked discussion in the public press, which developed the existence of a considerable sentiment in favor of the abolishment of naval prize. Under advice of the Judge Advocate General, the United States has restored to the individual or corporate owners the several merchant vessels found in the harbor, on the ground that it is illegal for the army to take private property of any kind as booty. The Executive Department has also dismissed the appeals to the Supreme Court in the cases of the Spanish private merchant vessels, *Miguel Jover and Catalina*, captured on the high seas on the ground that they were within the spirit, if not the letter of the Executive Proclamation, granting time for enemy's vessels to depart from American ports.

The constitution of prize courts is an anomaly in jurisprudence ; but the law of prize is part of the law of nations, and prize courts are said to be "tribunals of the law of nations," and the jurisprudence they administer is a part of that law. They deal with cases of capture as distinguished from seizures ; their decrees are decrees of condemnation, not of forfeiture ; they judge the character and relations of the vessel and cargo, and not the acts of persons.¹ Still it results that every decision of a prize tribunal is, or results in, a national act. The sovereign must either carry it out, or set it aside. The latter he will not be permitted to do, unless it be in his own favor. As a judicial decision, it is the most solemn and responsible opinion a learned doctor of the law can give ; and, as a national act, it is done on the most solemn responsibility that can rest on a sovereign.²

"The judgments of prize courts having jurisdiction are conclusive ; but not when not in conformity with international law. These courts are viewed in two aspects : The first is that of international tribunals, in which capacity they bind the thing acted on everywhere, and bind the parties so far as con-

¹ *The Rapid*, 8 Cranch. 155 ; *Opinions of Attorney Generals*, II, p. 445.

² *Dana's Wheat*. p. 28, note.

cerns such thing. The second is that of domestic tribunals (in which light they are to be considered in all respects, except as to the proceedings *in rem*), which are simply agents of the sovereign which commissions them. Hence, a sovereign is as much liable internationally for the wrongful action of prize courts as he is for the wrongful action of any other courts. It was consequently held in the case of the *Betsey*, before the London Commission of 1798-1804, that while in particular the decisions of prize courts bind the parties, so far as concerns the particular litigation acting *in rem*, they may be contested by the government of the party which feels aggrieved."¹

These tribunals have been the most convenient for the purposes for which they were designed; and, in general, they have worked out satisfactory ends. The time may be approaching when a regularly constituted International Prize Court will be established by the paramount maritime powers. Influences in that direction are already in operation.²

¹ Wharton, Int. Law, Vol. III, Sec. 329 a.

² *Annuaire de l'Institut de Droit International*, Ghent, 1878, Vol. X. pp. 113-130.

As a result of a number of Prize causes originating during the recent war between the United States and Spain and disposed of by U. S. District Courts, the following decisions have been rendered: A Spanish merchant vessel captured after the declaration of war by a U. S. Cruiser while bound from a neutral to a Spanish port, is lawful prize. Act of 25 April, 1898, declaring that war has existed since 21 April, 1898, between the United States and Spain, fixes the precise period when the duties and obligations imposed by the condition of war arise: *The Rita*, 87 Fed. 925.

The President's proclamation of 26 April, 1898, exempting from capture Spanish vessels in American ports, applied to vessels in such ports at the outbreak of the war though they sailed before the date of the proclamation. Vessels of war have the right, in the absence of any declaration of exemption by the political power, to capture enemy's property whenever and wherever found afloat, and the burden is on the claimant to show that it comes within the exemption of any such proclamation. Vessels or cargo belonging to trading houses in the enemy's country, or to corporations formed under the laws thereof are subject to capture, regardless of the domicile of the partners or stockholders. The exemption declared by the President's proclamation in favor of neutral goods under the enemy's flag applies to the case of a capture between the outbreak of hostilities and the date of the proclamation. The fifth article of the President's proclamation, exempting from capture Spanish vessels bound for American ports at the outbreak of hostilities, does not apply to vessels which sailed

Claims for bounty granted by the United States Statutes¹ for the destruction of the public vessels of an enemy stand upon different and higher ground than prize for the capture of private property of enemy subjects, and are not properly subject of the adverse criticism which is directed against the latter. In regard to the former, an Auditor of the Treasury Department was reported to have recently ruled that such claims may not be settled directly by the Treasury Department, as was the current impression they would be, but that they require adjudication by a court. A protest has already been interposed to this ruling, and it is insisted on behalf of the beneficiaries that full jurisdiction is granted the Executive Department to settle these claims; that there is no statutory requirement of adjudication express or implied; and that no jurisdiction exists for these claims in prize courts.

Upon inquiry at the Treasury Department, it is learned that as no question as to the proper procedure or forum for the adjustment of these bounty claims had yet arisen, that Department had not made any ruling or taken any action thereon. The opinion was, however, unofficially expressed, that, in the absence of further legislation, the precedent furnished by the action of the Supreme Court of the District of Columbia, sitting as a District Court of the United States, in the year

from European ports for Cuba, there to discharge, though in the ordinary course they would then come to an American for port cargo. An enemy's vessel clearing from an American port for a foreign port prior to the outbreak of hostilities, with liberty to touch at another American port for coal, was not "bound" for such port, so as to be exempt from capture under the President's proclamation of 26 April, 1898. Enemy's vessels are subject to capture after the actual outbreak of hostilities though no declaration or proclamation of war has yet been made. Cargo shipped in enemy's vessels, by neutrals to parties in the enemy's country, is presumptively enemy's property, but the presumption may be overcome by evidence. Cargo shipped from this country in an enemy's vessel, to residents of a neutral country, is presumptively neutral cargo: *The Buena Ventura*, 87 Fed. 927.

Appeals to the Supreme Court of the United States have been taken in these several cases and are now pending, except in the cases of the *Miguel Jover* and the *Catalina*, which, as already stated, the appeals on behalf of the United States have been withdrawn by the Attorney-General.

¹ § 4635.

1873, in the cases of the *Fanny*, *Seabird*, *Black Warrior*, and *Forrest*, would be followed. The decision of the District Court (In Admiralty, Wylie, J.), rendered March 1, 1870, in the matter of the bounty claims of Farragut and others, dismissing the libel therein filed, for want of jurisdiction, on the ground that head money or bounty is not prize under the law, but a gratuity which the Government has promised to distribute under the direction of the Secretary of the Navy, is cited by counsel on behalf of beneficiaries in support of the contention that these claims should be settled by the accounting officers of the Treasury Department.

The Executive Policy of the United States in Respect to the Exemption of Private Property, except Contraband of War, from Capture at Sea.

A contemporary writer calls attention to the fact that the attitude of the United States from its foundation, down to the outbreak of the present war between Spain and the United States, has been consistent in its advocacy of the exemption of private property, except contraband of war, from capture at sea. It is pointed out that the United States adopted the principle in the Treaty of 1785 with Russia; proposed it to England, France, and Russia in 1823, and in 1856, at the time of the Treaty of Paris, offered to abolish privateering in order to get it adopted by the powers. In 1861, Mr. Seward favored its acceptance; in 1870, Mr. Fish expressed to the Prussian Government the hope that we might be "gratified by seeing it universally acknowledged;" in 1871, it was adopted through his exertions in the Treaty with Italy, which stipulates that, in case of war between the United States and Italy, "the private property of their respective citizens and subjects, with the exception of contraband of war, shall be exempt from capture or seizure on the high seas or elsewhere by the armed vessels or by the military forces of either party," except in the attempt to enter a blockaded port. "The attitude of this government," says the writer, "in this respect is fixed; and whatever might be said for or against the adoption

of the principle in the present war with Spain, and as to whether Spain would have probably granted or refused reciprocal treatment, in view of the reservation made by it in regard to privateering (in its acceptance of the principles of the Declaration of Paris), all the arguments which led to the early and consistent advocacy of the principle by this government still obtain." ¹

Alexander Porter Morse.

Washington, October 19, 1898.

¹ W. L. Penfield, "International Piracy in Time of War," *North American Review*, July, 1898.